Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-656

In the Supreme Court of the United States

OCTOBER TERM, 1984

CAROL L. MEYER, PETITIONER

v.

JOHN LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-656

CAROL L. MEYER, PETITIONER

v.

JOHN LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner seeks review of a court of appeals' decision affirming a district court judgment that she failed to establish her claim of gender discrimination in this Title VII case.

1. Petitioner is a GS-12 civilian employee at the Naval Facilities Engineering Command in San Bruno, California (Pet. 3; Pet. App. 1a). In 1979, the Navy established an intergovernmental coordination unit to which both petitioner and Robert Talley were assigned (Pet. App. 9a). Both applied for the unit's newly-created GS-13 permanent supervisor position (*ibid.*; Pet. 3). A selection panel consisting of three men unanimously chose Talley for the job (*ibid.*). Petitioner thereafter filed an Equal Employment Opportunity complaint and unsuccessfully exhausted her administrative remedies (*ibid.*). She then brought this action in the district court, alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).

After a nonjury trial, the district court held against petitioner (Pet. App. 1a-6a), finding the evidence insufficient to establish discrimination based on sex (*id.* at 5a). The court recognized that both candidates were well qualified for the position (*id.* at 2a), but observed that "[t]here was substantial credible evidence on the basis of which a fairminded person could have selected Talley over the [petitioner]," stressing Talley's "ability to communicate and to supervise the performance of work of others." *Id.* at 3a-4a. The court also noted Talley's superior experience in Navy planning activities (*id.* at 2a-3a). Thus, while "[r]easonable persons might well have reached different decisions on the promotion," the court found that "the evidence is insufficient to establish that more probably than not sex discrimination was the factor in the decision to recommend Talley." *Id.* at 5a.

Petitioner appealed, and the Ninth Circuit affirmed. The court of appeals held that the district court's factual findings were not clearly erroneous, emphasizing Talley's communication skills and superior supervisory experience and potential, as well as the fact that Talley had four more years of experience in the Navy Department than did petitioner. Pet. App. 10a-11a. The court therefore held that the district court's conclusion that plaintiff had failed to carry her burden of proving discrimination was not clearly erroneous.

2. Petitioner urges this Court to modify its unanimous holding in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), to require the defendant in a Title VII case alleging discriminatory treatment to produce evidence of "business necessity" for an employment decision, once the plaintiff has established a prima facie case of discrimination. In *Burdine*, however, this Court considered and rejected such an approach in a case of discriminatory treatment by an individual claimant (450 U.S. at 258-259); the Court stated that Title VII "does not demand that an

employer give preferential treatment to minorities or women," nor is it "intended to 'diminish traditional management prerogatives.' " 450 U.S. at 259. Requiring an employer to produce evidence of "business necessity" for its individual employment decisions, however, would have precisely these effects, instead of merely assuring "neutral employment and personnel decisions." *Ibid.*

Burdine held that once the plaintiff in a discriminatory treatment case has established a prima facie case, the defendant must produce evidence of a legitimate, nondiscriminatory basis for the challenged employment decision, but that the plaintiff then bears the ultimate burden of proving that the proffered nondiscriminatory reasons are pretextual. The *Burdine* approach is entirely consistent both with the goals of Title VII and with the traditional principle that the plaintiff bears the burden of proving his or her case. Title VII simply does not contemplate the type of burden shifting advocated by petitioner. Thus, there is no basis for petitioner's proposed modification of *Burdine*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

DOJ-1985-01